

[Cite as *Abernethy v. Abernethy*, 2010-Ohio-435.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92708

EVE ABERNETHY

PLAINTIFF-APPELLEE

vs.

ROBERT H. ABERNETHY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Domestic Relations Division of
Cuyahoga County Court of Common Pleas
Case No. CP D-244420

BEFORE: Blackmon, J., Cooney, P.J., and Jones, J.

RELEASED: February 11, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Joseph G. Stafford
Nicholas M. Gallo
Gregory J. Moore
Stafford & Stafford Co., L.P.A.
The Stafford Building
2105 Ontario Street
Cleveland, Ohio 44115

ATTORNEY FOR APPELLEE

Jerald J. Kennemuth
2390 Lost Nation Road
Willoughby, Ohio 44094

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Robert H. Abernethy (“husband”) appeals the domestic relations court’s order denying his motion to modify or terminate spousal support and granting the contempt motion of appellee Eve Abernethy (“wife”). He assigns five errors for our review.¹

{¶ 2} Having reviewed the record and requisite law, we affirm the domestic relations court’s decision.

Facts

{¶ 3} The parties were married on August 28, 1983 and divorced seventeen years later. Under the terms of the divorce decree, the husband is obligated to pay the following spousal support amount:

“[C]ommencing February 1, 2000 Defendant shall pay to Plaintiff the sum of \$1,530.00 which sum includes 2% processing charge, every month as spousal support. Such support shall terminate upon either party’s death, or Plaintiff’s remarriage or cohabitation with an unrelated male, subject to further order of the court.”

{¶ 4} In support of this order, the court found that throughout the marriage the wife was unemployed due to her marital responsibilities. At the time of trial, she was financially dependent upon the husband and showed no evidence of becoming self-supporting.

¹See appendix.

{¶ 5} Under the property division, the husband was awarded all the marital interest in A&H Trucking and ordered to pay the wife \$32,000 plus 3% at \$500 a month until the \$32,000 with accrued interest was paid in full. The husband was also ordered to pay the wife one-half of a Dean Witter retirement account, which was valued at \$17,600.

{¶ 6} The husband failed to pay as ordered by the court, and the wife filed a motion for contempt. At that hearing, the husband admitted that he failed to comply with the court order and admitted that he cashed out the Dean Witter account and failed to pay half to his wife.

{¶ 7} On October 30, 2006, the court issued an order finding the husband in contempt for failure to follow the court order regarding payments of spousal support and property division. The court concluded that the husband owed the wife \$41,075.88 for spousal support and \$45,896 for the property division. The trial court sentenced the husband to thirty days in jail and \$250 in fines for each violation of nonpayment of spousal support and nonpayment of the property division. Both sentences were suspended pending the trial court's determination of a reasonable purge order.

{¶ 8} On May 24, 2007, the trial court filed the purge order, which required the husband to pay the wife \$2,500 by certified check within 30 days of the decision. The husband was ordered to file his federal and state income tax by April 15 of each year, to mail those returns to the wife by June 15 of

each year, and to pay the full amount of each tax refund he received to the wife until the property division arrearage was fully paid.

{¶ 9} In order to purge his failure to pay spousal support, the husband was ordered to pay \$600 monthly, effective July 1, 2007. He was ordered to pay this amount through the Cuyahoga County Support Enforcement Agency (“CSEA”), plus 2% for its administrative costs. This \$600 monthly payment was to be made “in addition to the current spousal support of \$1,500 due monthly.” After spousal support arrearage was paid in full, the husband was ordered to continue to pay the \$600 per month until the division of the property award was satisfied.

{¶ 10} Although the husband commenced paying the spousal support, he failed to comply with the conditions to pay the spousal support and property division arrearage. As a result, on September 11, 2007, the wife filed a motion to enforce the contempt motions. In response, the husband filed a motion to modify or terminate the spousal support order.

{¶ 11} A hearing was held and the evidence presented at trial showed that the wife’s financial situation had not changed since the divorce. She is 69 years old and unable to work. Her only income consisted of \$544 per month in Social Security payments and the \$1,500 per month that she received from the husband for spousal support. Her monthly mortgage payment is \$750. She resides with her adult handicapped son and her

granddaughter, who attends college. Although her son receives disability payments, he uses them to pay for his own food and for the security system for the home. The granddaughter also works but uses her income for her tuition and books.

{¶ 12} The evidence showed that in 2006, the husband received \$39,619 in wages and also received \$18,662 in Social Security benefits. In 2007, the husband received \$39,728 in wages and \$19,334 in Social Security benefits. In addition, the husband is entitled to receive \$1,395.58 a month under a 60-month promissory note commencing in January 2006. Thus, he receives an additional \$16,686 as provided under the terms of the promissory note. Based on this evidence, the husband's 2006 income was \$74,967.96 and in 2007 his income was \$75,745.96. He admitted that he had "very little" debt with no mortgage payments.

{¶ 13} The husband currently works as a truck dispatcher from 8 a.m. to 5 p.m., five days a week. Although his medical records indicate that he suffers from diabetes and underwent a coronary bypass in 2004 and in 2007, the only medical evidence as to the effect of these conditions on his ability to work is contained in a document entitled, "Return to Work Status," which was signed by a doctor and states that the husband "has recovered well."

{¶ 14} On January 6, 2009, the trial court issued the order, which is the subject of this appeal. The trial court granted the wife's motion to enforce

the prior contempt order after concluding that the husband did not dispute that he failed to comply with the order; the court also concluded the husband had the financial ability to comply with the purge order.

{¶ 15} As for his failure to pay the wife the \$2,500 and his failure to give the wife his tax refunds, he was sentenced to 30 days in jail. He was sentenced to an additional ten days in jail for his failure to pay the wife \$600 a month for his arrearage. He could, however, purge the ten-day jail sentence if he paid the wife \$3,600, plus the \$72 administrative fee owed to the Child Support Enforcement Agency (“CSEA”) before his 30-day jail sentence, which was to be served on weekends.

{¶ 16} The court denied the husband’s motion to modify or terminate spousal support on the grounds that no change of circumstances had occurred. In fact, the court found that his income had increased. The court also concluded the husband’s medical problems did not effect his ability to work.

Spousal Support

{¶ 17} In his first two assigned errors, the husband argues the trial court erred by failing to modify or terminate his spousal support obligation since his income has been reduced and he has health problems.

{¶ 18} We will not disturb a trial court's determination on domestic relations matters, such as spousal support, absent an abuse of discretion.² An abuse of discretion connotes more than an error of law or judgment; it implies an unreasonable, arbitrary or unconscionable decision.³

{¶ 19} R.C. 3105.18(E) states, in pertinent part, that the trial court may modify the amount or terms of a spousal support order upon a determination that "the circumstances of either party have changed[.]" A "change in the circumstances of a party includes, but is not limited to, any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses."⁴ Further, a change in circumstances necessary to modify spousal support must be substantial.⁵ The burden of showing that a modification in spousal support is warranted is on the party who seeks it.⁶

{¶ 20} Although the husband contends that the marriage was eleven years in length, in *Abernethy I*,⁷ this court concluded the length of the

²*Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028; *Kucmanic v. Kucmanic* (1997), 119 Ohio App.3d 609, 612, 695 N.E.2d 1205.

³*Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

⁴See R.C. 3105.18(F).

⁵*Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703, 706, 676 N.E.2d 1249, appeal not allowed, 77 Ohio St.3d 1480, 673 N.E.2d 142.

⁶*Joseph v. Joseph* (1997), 122 Ohio App.3d 734, 736, 702 N.E.2d 949; *Tremaine*, 111 Ohio App.3d at 706, 676 N.E.2d 1249.

⁷*Abernethy v. Abernethy*, Cuyahoga App. No. 80406, 2002-Ohio-4193 (*Abernethy I*).

marriage was seventeen years. Therefore, res judicata prevents him from re-arguing this issue.

{¶ 21} We conclude the trial court did not abuse its discretion by refusing to modify the husband's spousal support obligation because there was no change of circumstances. The husband contends his income is now less than the \$70,000 per year⁸ found at the time in the original divorce decree; the record indicates otherwise. In determining an award of spousal support, income is determined by considering "income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 * * * of the Revised Code."⁹

{¶ 22} Considering the husband's income from all sources, including his wages, Social Security benefits, and income received from the promissory note, he earned \$74,967.96 in 2006 and \$75,745.96 in 2007. These amounts are consistent with the husband's testimony that he had not sustained any reduction in income.

{¶ 23} At oral argument, the husband contended for the first time that the trial court improperly considered the promissory note because it was not entered as an exhibit at trial, but was instead attached to the wife's post-trial

⁸The husband contends the trial court erred by concluding the original judgment entry indicated his income was "\$34,795." However, this amount represented his wages and did not include the Schedule K income he received as 40% owner of the company.

brief. Because the husband failed to timely raise his objection, this issue is waived.¹⁰

{¶ 24} The husband also contends that modification is necessary due to his poor health; however, he has not produced evidence that his medical conditions have affected his ability to work or his earnings. He stated that he works five days per week, eight hours per day, and drives himself to work. Moreover, a “Return to Work Status” document indicates his doctor stated he “has recovered well.” Therefore, based on the evidence, we conclude the trial court did not abuse its discretion by concluding the husband’s health did not provide grounds for modification.

{¶ 25} The trial court also did not abuse its discretion in refusing to terminate the spousal support. The original divorce decree provided for termination of spousal support in only three circumstances: either party’s death, or the wife’s remarriage or cohabitation with an unrelated male. The only alleged changes the husband claimed were a reduction in income and change in his health, which are not grounds for terminating the support. Accordingly, the husband’s first and second assigned errors are overruled.

Contempt Order

⁹R.C. 3105.18(C)(1)(a).

¹⁰*Stern Enterprises v. Plaza Theaters I & II, Inc.* (1995), 105 Ohio App.3d 601, 664 N.E.2d 981.

{¶ 26} In his third assigned error, the husband challenges the trial court's contempt order; he claims he could not comply with the terms of the purge order.

{¶ 27} When reviewing a finding of contempt, including the imposition of penalties, we apply an abuse of discretion standard.¹¹ The prima facie elements of civil contempt include the existence of a court order and the party's noncompliance with the terms of that order.¹² The burden then shifts to the defendant to establish any defense he or she may have for nonpayment.¹³ Intent is not a prerequisite to a finding of contempt, but a court may consider whether the party has attempted to comply or attempted to flout the court order.¹⁴

{¶ 28} The husband, after the initial contempt hearing, did commence paying spousal support. But he has failed to comply with the trial court's order, which required him to pay the support and property arrearage and to give his tax refunds to the wife. Thus the issue is whether the husband has a valid defense to the nonpayment of the arrearage. The husband claims as

¹¹*Denovchek v. Board of Trumbull Cty. Commrs.* (1988), 36 Ohio St.3d 14, 16, 520 N.E.2d 1362; *In re Contempt of Morris* (1996), 110 Ohio App.3d 475, 479, 674 N.E.2d 761.

¹²*Morford v. Morford* (1993), 85 Ohio App.3d 50, 619 N.E.2d 71.

¹³*Id.* at 55, citing *Rossen v. Rossen* (1964), 2 Ohio App.2d 381, 208 N.E.2d 764.

¹⁴*Id.* at 55, citing *Pugh v. Pugh* (1984), 15 Ohio St.3d 136, 472 N.E.2d 1085.

his defense the inability to pay. Our standard of review is whether the trial court abused its discretion. We conclude it did not. The husband failed in his proof to show a reduction in income.

{¶ 29} Moreover, part of the finding of contempt was based on the husband's failure to pay to the wife the amount of his tax refunds as he was directed to do in the prior purge order. By his own admission, he received in 2006 a \$3,455 federal tax refund and in 2007 he received a \$3,796 tax refund that he did not pay to the wife.

{¶ 30} The husband also contends his health problems have affected his ability to work. But he failed to provide evidence that his medical conditions have affected his ability to work; he works five days per week, eight hours per day.

{¶ 31} He also contends as a defense that his wife is able to work and that two individuals live with her who assist with her expenses. This argument is baseless. The basis for the contempt finding was the fact that he failed to pay accumulated arrearage. It has nothing to do with the wife's ability to pay. Moreover, the testimony indicated that any financial help from these individuals, a disabled son and a granddaughter attending college, is minimal.

{¶ 32} The husband argues he should not have been found to be in contempt because CSEA failed to garnish his wages for the \$600 arrearage

until a week prior to the hearing. This argument is disingenuous. The husband was on notice under the court's May 24, 2007 purge order that the \$600 per month was to be paid. He obviously knew that CSEA was not garnishing his wages, but did nothing to rectify this problem. He has the opportunity to purge his sentence for the failure to pay the \$600 per month by paying the wife \$3,600, plus a \$72 administrative fee before the conclusion of his 30-day sentence.

{¶ 33} Lastly, the husband argues that he should not be held in contempt because the wife also failed to comply with the trial court's prior order to provide the accounting on the property by December 31, 2007. There is no comparison between the parties' actions. Although the wife failed to file the accounting by December 31, 2007, it was due to her inability to view the documents after her eye surgery. She did provide the documents on January 16, 2008. This short delay does not provide a defense for the husband's protracted delay in paying his arrearage. Accordingly, the husband's third assigned error is overruled.

Purge Order

{¶ 34} In his fourth assigned error, the husband contends the terms of the purge order were unreasonable, and that the order should have allowed for community service in lieu of incarceration.

{¶ 35} Initially we must address whether we have jurisdiction to consider this argument. The wife contends that the husband should have appealed the purge order when it was issued on May 24, 2007, and that the time to appeal has expired. We agree.

{¶ 36} In order for there to be a final order in contempt of court proceedings, there must be both a finding of contempt and the imposition of a sentence or penalty. The mere adjudication of contempt of court is not a final appealable order until a sanction or penalty is also imposed.¹⁵

{¶ 37} We conclude that the May 24, 2007 order constituted a final order. The order not only makes a finding of contempt, but it also imposes a suspended sentence of 30 days in jail. The addition of the sentence, albeit, suspended, supplies the second element rendering the order final.¹⁶ Therefore, because the husband failed to file a timely appeal from the contempt order, he cannot now challenge the conditions imposed. Accordingly, the husband's fourth assigned error is overruled.

Manifest Weight

¹⁵*Cooper v. Cooper* (1984), 14 Ohio App.3d 327, 471 N.E.2d 52; *Chain Bike v. Spoke 'N Wheel, Inc.* (1979), 64 Ohio App.2d 62, 410 N.E.2d 802.

¹⁶*Farrell v. Farrell*, 5th Dist. No. 2008-CA-0080, 2009-Ohio-1341; *Peterson v. Peterson*, 5th Dist. No. CT2003-0049, 2004-Ohio-4714; *McCrea v. McCrea* (Nov. 20, 1986), Cuyahoga App. No. 51324.

{¶ 38} In his fifth assigned error, the husband, in conclusory fashion, incorporates all of the assigned errors to support his argument that the trial court's judgment was against the weight of the evidence.

{¶ 39} We neither weigh the evidence nor judge the credibility of the witnesses in analyzing manifest weight arguments in civil cases. Our role is to determine whether competent and credible evidence exists upon which the factfinder could base its decision.¹⁷ Competent and credible evidence existed that the husband had more income and was healthy. The evidence also showed he failed to purge the contempt, and the evidence showed he was able to comply. Accordingly, the husband's fifth assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

¹⁷*C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280, 376 N.E.2d 578.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

COLLEEN CONWAY COONEY, P.J., and
LARRY A. JONES, J., CONCUR

APPENDIX

Assignments of Error

“I. The trial court erred and/or abused its discretion by denying the appellant’s motion to modify/terminate support.”

“II. The trial court erred and or/abused its discretion by failing to terminate the appellant’s spousal support obligation.”

“III. The trial court erred and/or abused its discretion by granting the appellee’s motion to show cause and by finding the appellant in contempt.”

“IV. The trial court erred and/or abused its discretion in ordering the appellant to pay purge in amounts he cannot afford; sentencing the appellant to jail; and by failing to permit the appellant the ability to purge his contempt by performing community service in lieu of incarceration.”

“V. The trial court’s decision is against the manifest weight of the evidence.”